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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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Office of Secretary

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| In the Matter of | ) | |
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| Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-128 |
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## MOTION TO ACCEPT PETITION FOR RECONSIDERATION, OR IN THE ALTERNATIVE TO TREAT AS COMMENTS ON PETITIONS FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel"), by its attorney, hereby requests that the Commission accept the attached petition for reconsideration ("PFR"). Due to unanticipated delays in making final preparations for filing of the PFR, counsel was unable to deliver the PFR to the Commission's offices before close of business on October 21, 1996. However, CompTel submits this motion and attached petition immediately upon re-opening of the Commission on October 22, and has undertaken substantial efforts to ensure that all interested parties receive notice of CompTel's petition in the same time frame as if filed on October 21. In view of the extremely unusual circumstances created by Section 276's statutory deadline for Commission action on requests for reconsideration and the shortened time period allotted for filing such petitions, CompTel requests that the Commission accept this PFR.

On September 20, 1996, the Commission adopted a Report and Order ("R&O") in the above-captioned proceeding to implement the pay telephone provisions of



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Section 276 of the Telecommunications Act of 1996. In response to an unusual statutory requirement that reconsideration of the R&O be completed before November 8, 1996, the Commission required that petitions for reconsideration be filed "within 30 days from release of this document."[1] The date listed on the face of the document as the release date is Friday, September 20, which would make October 21 the filing date for petitions for reconsideration. However, Section 1.4(b)(2) of the Commission's Rules defines "release date" as the date on which the document is made available to the press and public.[2] To the best of the knowledge of the undersigned, the text of the R&O was not actually made available to the press and public until Monday, September 23, when it appeared in the FCC's Daily Digest.[3] It also should be noted that neither Communications Daily nor Telecommunications Reports reported the release of the R&O in their September 23 editions; in each case the decision was reported on the next publication date after September 23, along with other articles on items released on the 23rd.[4]

Although CompTel's counsel attempted to file the attached PFR within 30 days of the September 20, 1996 release date listed on the R&O, due to unanticipated delays in the final preparations of the PFR for filing, counsel's paralegal arrived at the Commission at 5:31 p.m., after the Secretary's office had closed. Counsel submits this motion and accompanying PFR immediately upon reopening of the Commission on Tuesday, October 22,

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[1] R&O at ¶ 300.

[2] 47 C.F.R. § 1.4(b)(2).

[3] FCC Daily Digest, September 23, 1996 (listing R&O).

[4] See Communications Daily, Sept. 24, 1996, at 1; Telecommunications Reports, September 30, 1996, at 6.

1996. If the release date of the R&O is September 20 as shown on the face of the document, then the PFR is one-day late. On the other hand, if actual release of the R&O did not occur until Monday, September 23, the PFR is timely filed.

Accordingly, if the Commission deems it necessary, CompTel requests leave to file the attached PFR one day after the 30 day period measured from the date on the face of the R&O. Under Section 405 of the Communications Act and Section 1.429 of the Commission's rules, the Commission ordinarily discourages such filings, but is not precluded by either from accepting the pleading in extremely unusual circumstances.[5] Here, extremely unusual circumstances exist because the Commission has shortened the usual time period allotted for petitions for reconsideration and instead based the reconsideration period upon the release date of the R&O, which is stated on the R&O as September 20, 1996, but may not have occurred until September 23. Although counsel was unable to file within the earlier time frame established by the date listed on the R&O, it submits this PFR prior to the October 23, 1996 filing date that would apply if the Commission's order is determined not to have been released until September 23, 1996.

In addition, CompTel is taking measures to ensure that no interested parties are prejudiced by this filing. Counsel has contacted the Commission's copy contractor, ITS, to determine the number of orders for copies of petitions for reconsideration have been

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[5] See Virgin Islands Telephone Corp. v. FCC, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (FCC may not accept late-filed petitions for reconsideration in the absence of extremely unusual circumstances); Meredith Corp. v. FCC, 809 F.2d 863, 869 (D.C. Cir. 1986) ("section 405 has never been construed as an absolute bar on reconsideration of issues raised after 30 days"); cf. 32 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations, 10 FCC Rcd 11218 (1995) (Commission does not ordinarily waive or extend the filing period for petitions for reconsideration).

placed with the contractor. Simultaneous with this motion, counsel is delivering to ITS sufficient additional copies of this motion and attached PFR for inclusion with each of the pending orders for copies. In addition, counsel will hand deliver or distribute by facsimile copies of this motion and attached PFR to any interested party that contacts the undersigned. Accordingly, interested parties will not be harmed by the overnight delay in filing this petition.[6]

If the Commission concludes that the PFR is not timely filed, and if it chooses not to accept the PFR as late filed, CompTel requests that the Commission treat the attached PFR as comments on petitions filed on October 21, 1996. Since such comments would not be due until October 28, no party would be harmed by filing of this pleading early.

Respectfully submitted,
THE COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION

By: ______________________
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Its Attorneys

October 22, 1996

[6] CompTel also notes that the Commission's reconsideration of this proceeding will not be delayed by acceptance of this petition. Other parties have submitted petitions for reconsideration in this docket, some of them raising issues similar to those raised by CompTel in the attached PFR. Therefore, the Commission must address these issues in any event, and would benefit from the additional input CompTel can offer in the PFR.

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# PETITION FOR RECONSIDERATION


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October 21, 1996

## SUMMARY

The Commission's Report and Order on payphone compensation has awarded private payphone service providers ("PSPs") a staggering $192,000,000 in the next year alone for 800 number calls. And since all of the costs of tracking and billing those calls are to be imposed on long-distance carriers, this sum is *entirely profit*. Next year, when LEC payphones also become eligible for compensation, the total amount of payphone profit from 800 and access code calls will rise to $1 billion annually as a result of the Report and Order. This Commission decision is seriously flawed and should be reconsidered for several reasons.

First, the amount of compensation to be awarded is based on an arbitrary and inappropriate methodology. Rather than calculate the proper compensation level based on an incremental cost approach, the Report and Order relies on local coin rates as a surrogate. This decision is wholly inconsistent with the Commission's recent Interconnection Order which found Total Element Long Run Incremental Cost ("TELRIC") to be the best measure for pricing of unbundled elements.

This failure to utilize incremental cost analysis led directly to the Report and Order's egregious decision to overcompensate PSPs by such a huge margin. Had the Commission analyzed the costs correctly, it would have understood the error of comparing the PSPs' cost of 800 calling with local coin calls. For example, local coin rates must recover the cost of coin signalling, coin collection and local usage charges from the LEC. None of these are incurred in an 800 or access code call; in fact, there are virtually no additional costs incurred by the PSP. The amount of compensation thus is improperly calculated and should be reconsidered.

The second major flaw in the Report and Order is the decision to impose on IXCs the burden and cost of tracking compensable calls. The erroneous reasoning

underlying this conclusion was that IXCs are "the primary economic beneficiary of the call." While this may be true for the costs of carrying calls, it clearly is not true for the tracking and billing function. It is one thing to tell IXCs they must pay for the economic value of a good they currently receive for free, but it is entirely another to conclude they "benefit" from this new payment obligation and therefore must also pay to monitor their own usage and bill themselves. PSPs are indisputably the primary beneficiaries of monitoring and billing, and as such should be responsible for the costs associated with those tasks. The Commission should reconsider its decision to place the tracking and billing burden on IXCs.

Third, the Report and Order proposes to allow the compensation rate to vary from PSP to PSP after the first two years. If implemented, this plan will put IXCs in a wholly untenable position. IXCs will have no way to know the rate charged by any PSP, and thus will be unable to determine whether to block calls from particular PSPs. The result could be wholesale blocking by some IXCs of 800 calls from payphones, the opposite effect from that intended by Congress. The Report and Order should be reconsidered and a single compensation rate should be maintained for all PSPs.

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## PETITION FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully petitions the Commission to reconsider its Report and Order in the above-captioned docket.[1] As the principal industry association for competitive providers of telecommunications services, many of whom provide service originating from payphones, CompTel fully supports Section 276's requirement that payphone service provides ("PSPs") be fairly compensated for calls originating from their payphones. However, the R&O goes far beyond the mandate of fair compensation and provides PSPs with a several hundred million dollar windfall at the ultimate expense of hundreds of thousands of 800 service subscribers everywhere. What's more, the R&O imposes on those entities from whose pockets the windfall will come the additional obligation of identifying and recording calls for the PSPs and billing themselves for the amount owed. PSPs need to do nothing more than decide how much they want to be paid and wait for the checks to roll in.

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[1] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-128, FCC 96-388 (rel. Sept. 20, 1996) ("R&O"). Pursuant to paragraph 300 of the R&O, CompTel submits this petition within 30 days of the release of the R&O.

CompTel submits that this result could not have been intended by Congress when it directed the FCC to devise a fair compensation scheme for payphone calls. Rather than set a fair compensation amount as required by Section 276 of the Act, the Commission arbitrarily washes its hands of the task, basing compensation on a surrogate which bears no relationship to any conceivable cost incurred by PSPs in originating calls from payphones. In addition, the Commission reverses, without comment, sixty years of practice that the cost and responsibility of billing for an activity falls on the seller, not on the buyer. Accordingly, CompTel requests that the Commission reconsider its R&O and adopt instead a system which provides reasonable cost-based compensation to PSPs and assigns the billing obligation to those who benefit from the compensation.

In addition, the R&O reverses the MFJ's restrictions on Bell Operating Company ("BOC") participation in interLATA carrier selection for their payphones, and grants the BOCs the right to negotiate with interLATA carriers to determine the 0+ carrier from BOC payphones. CompTel submits that BOC participation in this process at a time when they have not satisfied the requirements of Section 271 is contrary to the public interest. Accordingly, CompTel urges the Commission to reverse its decision and bar the BOCs from negotiating with interLATA carriers at this time.

## I. BACKGROUND

Section 276 requires the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed ... call using their payphone . . . ."[2] In the R&O, the Commission concludes that the statute does not require the Commission to prescribe compensation levels for every type of call.[3] Rather, where the PSP already has the ability to set a price for certain calls, the Commission can be confident that market forces will ensure PSPs recover the costs they incur in that activity, plus whatever profit they can extract through their market power. This is the case, the Commission concludes, with 0+ calls routed to the presubscribed carrier and with local coin sent-paid calls.[4] In both cases, the PSP has control over the compensation it receives and can adjust its compensation to account for increased expenses.

For the additional calls made from a payphone, however, public policy and billing difficulties prevent PSPs from exerting market power over the calls. Therefore, the Commission concluded that it should prescribe compensation for access code calls and subscriber 800 calls.[5] The Commission further concluded that the entity that is the "primary economic beneficiary" of a compensable call should be responsible for compensating the PSP.[6] This entity, the Commission found, is the carrier to whom the call is routed.[7] However, for reasons of administrative convenience, the Commission limited the per-call

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[2] 47 U.S.C. § 276(b)(1)(A). Emergency calls and telecommunications relay service calls are exempted from the compensation obligation, however. Id.

[3] R&O at ¶ 52-54.

[4] Id. at ¶¶ 53, 56. The R&O deregulates local coin rates, Id. at ¶ 58.

[5] Id. at 52. The term "subscriber 800 calls" is used throughout this petition to refer to all toll-free number calls, including calls using the 888 prefix.

[6] Id. at ¶ 83.

[7] Id.

tracking obligation to facilities-based carriers, who must administer compensation both for themselves and for their reseller customers.[8]

To set the amount of such compensation, the Commission rejected use of a marginal cost standard, as recommended by CompTel and others.[9] Instead of determining compensation based upon a call's cost to the PSP, the Commission chose to use the rate charged by the PSP for local coin calls as the required compensation amount for other calls originated from the payphone, unless a different rate is negotiated between the PSP and a carrier.[10] Relying on the prevailing rate in four sparsely populated Western states, the Commission mandated compensation at an amount equal to $0.35 per call for the first two years, with the compensation amount thereafter allowed to vary with the local coin rate by PSP and over time.[11]

Further, after an initial year of per phone compensation, the Commission determined that compensation must be paid to PSPs on a per call basis. Concluding the carriers receiving the traffic were the "primary economic beneficiaries" of compensable calls, the Commission placed the obligation to track and bill for compensable calls upon the carrier.[12] The carrier, therefore, must modify its call processing systems to identify compensable calls, record the number and origin of such calls, identify the PSP owning the

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[8] Id. at ¶ 86.

[9] Id. at ¶ 68.

[10] Id. at ¶¶ 70-71.

[11] Id. at ¶ 72.

[12] Id. at ¶ 83.

originating payphone, and send the PSP a "statement" along with a compensation check for the amount owed.

## II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO GRANT EXCESSIVE PROFITS TO PSPs AND SHOULD INSTEAD PRESCRIBE COST-BASED COMPENSATION

In the first year alone, the new compensation plan will increase PSP revenues by over $192 million, without increasing their costs one penny.[13] After the first year, the incumbent LECs also will share in this bounty, and (assuming the Commission's per phone compensation is an average for all payphones) compensation payments would explode to over $1 billion per year. In a market which the Commission has already concluded is substantially competitive, these sums are an unjustifiable windfall for PSPs. The compensation awarded by the Commission grossly overcompensates PSPs for the minor expense associated with placing access code or subscriber 800 calls from payphones. It cannot withstand scrutiny as being "fair" to those paying such compensation.

This result stems from a single source: the Commission's decision to rely upon local coin charges as a surrogate for compensation for access code and subscriber 800 calls. As shown below, the Commission deviates from its historic Interconnection Order by rejecting marginal cost pricing and arbitrarily fails to adjust its surrogate to account for cost and pricing differences which make the local coin rate a poor surrogate for access code or subscriber 800 costs.

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[13] Each of the approximately 350,000 independent PSPs will receive $45.85/phone/month for a total of $192,000,000 in additional revenues. Also, PSPs most likely can expect an increase of $0.10 per call for each local coin call placed from their phones.

A. The Commission Arbitrarily Rejects Compensating PSPs Based Upon the Marginal Cost Incurred in Originating a Call

In their comments, CompTel and a number of other commenters urged the Commission to compensate PSPs at a rate which recovers their marginal costs in originating compensable calls from their payphones.[14] As CompTel explained marginal (or incremental) cost pricing is fair to PSPs, and is consistent with the standard used by the Commission to conclude that compensation did not need to be prescribed for 0+ calls, where it concluded that, "The issue of fair compensation arises only [when] . . . the PSP does not receive any revenue to cover its marginal cost in originating the call."[15]

Although the Commission affirms its conclusion that 0+ calls need not be subject to prescribed compensation, citing the portion of the NPRM cited by CompTel,[16] it cursorily dismisses the idea of basing compensation on marginal costs. The Commission's sole explanation for rejecting marginal cost pricing is the statement that, "use of a purely incremental cost standard for all calls could leave PSPs without fair compensation for certain types of payphone calls, because such a standard would not permit the PSP to recover a reasonable share of the joint and common costs associated with those calls."[17]

This explanation misunderstands the pricing proposal made by CompTel and, more fundamentally, is inconsistent with the Commission's decision to adopt incremental cost-based rates in the Interconnection Order. First, it is critical to understand that an

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[14] CompTel Comments at 15-17.

[15] Id. at 16 (citing NPRM at ¶ 16, n.54).

[16] *R&O* at ¶ 53 (citing NPRM at ¶ 16).

[17] R&O at ¶ 68.

incremental cost standard would not apply to "all calls" from a payphone. Rather, the Commission must recognize that, with respect to 0+ calls and local coin calls, PSPs have significant discretion to establish the level of their own compensation, and will be able to recover their fixed costs through these means. It is only for the additional calls -- the calls that public policy will not allow PSPs to block -- that the issue of compensation arises. Here, therefore, it is appropriate to inquire as to what additional (or incremental) costs does a PSP incur to originate these calls. If this approach is taken -- market rates for 0+ and local coin, with incremental cost-based compensation for additional calls -- PSPs will be fully and fairly compensated for each and every call placed from their payphones.

Most troubling about the Commission's explanation, however, is that it is wholly inconsistent with the Commission's use of incremental cost pricing in the Interconnection Order. In that proceeding, the Commission employed an approach based upon Total Element Long Run Incremental Cost (TELRIC) for the pricing of unbundled network elements made available by incumbent LECs ("ILECs").[18] The Commission's TELRIC methodology is, of course, a long run incremental cost approach, like that which was proposed for compensation to PSPs. The Commission concluded in the Interconnection proceeding that TELRIC is a forward-looking cost model which will fully compensate ILECs for their costs in providing unbundled elements.[19] The Commission explained that forward looking cost models will replicate the workings of a competitive market by ensuring that rates are compensatory but driving rates toward incremental costs.[20]

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[18] Interconnection Order at ¶¶ 672-703.

[19] Id. at ¶ 679-82.

[20] Id. at ¶ 679.

The Commission cannot have it both ways, however. It cannot conclude in one proceeding that incremental costs are an appropriate basis for establishing rates, but dismiss the same approach in another proceeding as noncompensatory. The Commission got it correct in the Interconnection proceeding. Long run incremental costs are an efficient basis for mirroring a market result in areas where a market does not or cannot operate. The Commission should act consistently here and adopt a marginal cost-based compensation standard for payphones.

### B. Local Coin Rates May Not Be Used as a Surrogate for Costs of Other Payphone Calls

The Commission asserts that the rate a PSP charges end users for placing a local call is the best surrogate for the cost the PSP incurs in originating other types of calls from the payphone.[21] Although CompTel strongly agrees with the Commission's conclusion that the compensation amount must be consistent with payphone costs,[22] local coin rates are an improper basis for evaluating these costs.

Local coin rates are an improper basis because the costs associated with local coin calls are greater than those associated with other types of calls placed from the payphone. Most significantly, local coin rates must cover the cost of collecting and monitoring coin calls. Thus, coin rates must recover the additional cost of the coin mechanism on a payphone, the cost of collecting the monies deposited in the phones, and the cost of coin signalling capabilities to monitor time and usage on the call. Furthermore, most LECs

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[21] R&O at ¶ 70.

[22] See also id. at ¶ 67 ("PSPs should be compensated for their costs in originating . . . calls" from their payphones).

charge metered usage rates to PSPs for COCOT lines. Thus, the local call results in actual costs for the PSP, whereas an access code call results in the IXC paying for any usage charges associated with the call. Again, this is a cost savings to the PSP compared to local coin calls.

In addition, local coin rates are an improper surrogate because, like 0+ call commissions, the rate for a local coin call may incorporate "other factors" not related to the cost of the call.[23] Most notably, a local coin rate could be set to recover locational monopolies associated with the phone. For example, if a payphone served as a "neighborhood phone" in an area, local callers may not have an effective substitute for the payphone and might pay more than they otherwise would for use of the phone. In addition, the Commission may not discount the significant opportunities for strategic pricing of local calls if its compensation plan is implemented. Put simply, if the PSP knows that the local coin rate also will serve as a hidden surcharge on other calls, it might choose to engage in strategic pricing to increase its compensation amount. Any loss in local coin revenue could easily be recouped through higher hidden surcharges. For example, busy airports, bus stations and train stations might see local coin rates increase to $1 per call (or more) for the two weeks prior to Christmas each year, only to decrease thereafter when fewer 0+ and dial-around calls are likely. Basing compensation upon a local coin rate does not create an incentive for PSPs to lower compensation rates to reflect their costs. In fact, the opposite incentive is present.

[23] Cf. R&O at ¶ 69 (noting that 0+ commissions include compensation for factors other than the use of the payphone).

For these reasons, the rate a PSP charges for local coin calls is not a reasonable substitute for PSP costs incurred in originating access code and subscriber 800 calls. Instead, CompTel urges the Commission to base compensation upon the marginal costs a PSP incurs in originating these calls. If the Commission continues to use local coin rates as a surrogate, however, it must at least adjust the rate downward to reflect cost savings the PSP experiences and to account for the potential for strategic pricing by PSPs.

## III. THE COMMISSION SHOULD NOT ALLOW PER CALL COMPENSATION AMOUNTS TO FLUCTUATE BY PSP AND OVER TIME

After the first two years of its compensation plan, the Commission will allow compensation to vary from PSP to PSP, based upon the rate that the PSP charges for local coin calls.[24] Moreover, the compensation rate will vary over time from a given payphone, as the PSP adjusts its coin rate. This plan, in addition to creating opportunities for strategic pricing, subjects toll carriers to significant unknowable and unrecoverable costs. Accordingly, the plan arbitrarily imposes charges upon carriers subject to the compensation obligation.

The Commission appears to contemplate that carriers will know in advance the rate charged by a PSP. This belief, however, is inconsistent with market realities. The truth is that carriers will be unable to identify with any accuracy even the PSP that owns the payphone, much less determine the rate that PSP charges for local coin calls. Indeed, CompTel is not aware of <u>any</u> way a carrier will know the local coin rate prior to the call. It

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[24] In addition, in the first year of per-call compensation, the compensation amount can vary from phone to phone if the PSP and the carrier negotiate a rate that differs from the $0.35 per call default established by the Commission.

cannot go to a tariff; the Commission has deregulated local coin calls. It does not receive rate information in the call setup process. Signage on the telephone conveys information to the caller, not the carrier.[25] In addition, the carrier's records from the last time compensation was paid cannot be relied upon, because the identity of the PSP may have changed in the interim, or the PSP may have selected a new rate for local coin calls.

This total lack of information places the carrier in an untenable situation. If it cannot receive reliable information, the carrier will be unable to selectively block calls from individual payphones in order to control its costs. In addition, without knowledge as to what it will be charged, the carrier will be unable to pass the charge along to the end user or the 800 subscriber.[26] The most likely result of such a scenario is that the carrier will choose to block calls from all payphones, except those with which it has negotiated an individual contract. The public interest is hardly served by this scenario, where callers will encounter blocking with increased frequency and payphones will provide less ubiquitous service than they do today. In fact, it would be particularly ironic if the policy enacted to compensate PSPs for mandatory unblocking of access codes resulted in IXC blocking of all 800 calls from payphones.

CompTel therefore recommends that the Commission reconsider its decision to allow compensation rates to vary from PSP to PSP. The Commission should establish a

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[25] In addition, the telephone signage will not disclose to the caller that the local coin rate also applies as a hidden surcharge on dial around and toll free calls.

[26] Moreover, in many states the tariffing process will preclude the carrier from recovering its costs. Carriers will be unable to revise their tariffs often enough or quickly enough to keep pace with changes in local coin rates charged by individual PSPs.

single default compensation amount which applies to all payphones absent an agreement between the parties.[27]

## IV. TOLL CARRIERS SHOULD NOT BE RESPONSIBLE FOR TRACKING COMPENSABLE CALLS

In its comments, CompTel explained that most carriers were unable to track calls originating from payphones, and that the cost of acquiring this capability was prohibitively expensive, particularly for smaller carriers.[28] Instead, CompTel recommended that tracking be performed by the access provider for the payphone, as part of its access service, and that the cost of the tracking be borne by the PSPs since they are the ones that benefit from the receipt of compensation.[29]

In the R&O, however, the Commission places both the burden and the expense of tracking upon the carrier. The Commission chose this method because, in its view, the carrier is "the primary economic beneficiary of the payphone calls."[30] Both the LECs and the PSPs were relieved of this obligation, the Commission stated, because "neither LECs nor PSPs are the primary economic beneficiaries of payphone calls."[31]

In reaching this conclusion, however, the Commission misapplies its "primary economic beneficiary" standard. CompTel does not contest that, for purposes of determining

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[27] For the reasons explained above, this default amount should be based upon PSP marginal costs, not upon the local coin rate.

[28] CompTel Comments at 6-9.

[29] Id. at 9-10.

[30] R&O at ¶ 97.

[31] Id.

who should pay compensation for the call, that carriers are the primary economic beneficiary of the activity giving rise to compensation. Therefore, it is reasonable to require carriers, as opposed to callers or some other entity, to pay compensation to the PSP. However, in determining responsibility for administering the compensation system, the Commission's analysis must recognize that a different activity is involved. Now, the relevant activity is the receipt of compensation (not the carriage of a call). In this context, it is clear that carriers do not benefit from this activity (indeed, they are harmed by the activity in that they are required to pay money to the PSP). It is the PSP who benefits from the activity of receiving compensation. Thus, applying the Commission's "primary economic beneficiary" standard, the PSP benefits from receiving compensation and should pay the cost of identifying the calls for which it is entitled to payment and for the cost of billing its customers for the compensation.

The fallacy of the Commission's reasoning can be further illustrated by a simple example. When a buyer purchases stock through a stock broker, the purchaser stands to benefit (assuming the stock performs well) from the stock purchase. Therefore, the purchaser pays not only for the stock, but as the beneficiary of the purchase also is responsible for the broker's commission. However, the purchaser is not responsible for keeping track of the number of trades he or she has made, and reporting this number along with a commission payment to the broker. Instead, the broker, as the one seeking payment, bills the purchaser and bears the cost associated with that activity. Indeed, CompTel is aware of no other instance in the commercial world where the buyer of a good or service also bears the responsibility of billing itself for the good or service.

Thus, even ignoring the practical difficulties with performing the necessary call tracking (which are significant), the Commission's decision is irrational under the standard that it purports to apply. CompTel urges the Commission to reconsider its decision to require carriers to bear this burden, and instead place the obligation of billing for payphone calls upon the party seeking that payment -- the PSP.[32]

## V. THE COMMISSION MUST CLARIFY WHICH ENTITIES ARE REQUIRED TO TRACK COMPENSABLE CALLS FROM PAYPHONES

If the Commission nevertheless continues to require carriers receiving calls from payphones to track those calls, it must clarify which carriers are obligated to perform this tracking. In the R&O, the Commission concluded that, in order to reduce the compliance and administrative burdens of its per-call plan, "facilities-based carriers should pay the per-call compensation for the calls received by their reseller customers."[33] The Commission does not define, however, which carriers are considered "resellers" and which are considered "facilities-based" for compensation purposes. This lack of a definition presents significant uncertainty within the industry as to whether an entity is obligated to track calls originating from payphones. In order to avoid disputes concerning these obligations, CompTel requests that the Commission define more precisely which carriers are "facilities-based" and therefore required to track compensable calls and which carriers are "resellers" for whom the tracking will be provided by their underlying carrier.

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[32] As CompTel explained in its comments, it would be feasible for the access provider to perform the requisite tracking. CompTel comments at 9-10. It also may be feasible for at least some PSPs to perform such billing themselves through the phone instrument.

[33] R&O at ¶ 86.

## VI. BOC PARTICIPATION IN THE CARRIER SELECTION PROCESS IS NOT IN THE PUBLIC INTEREST AT THIS TIME

Section 276(b)(1)(D) of the 1996 Act gives the BOCs the ability to participate in the selection of a presubscribed interexchange carrier ("PIC") from BOC payphones, unless the Commission determines that such a right would not be in the public interest.[34] In the R&O, the Commission concludes that the record does not support a finding that BOC participation in the PIC selection process is contrary to the public interest. CompTel respectfully requests reconsideration of this conclusion.

There can be no disputing that the BOCs are, by far, the largest PSPs in the business. Peoples Telephone, the largest non-BOC PSP, has, by the Commission's own estimate, only 3 percent of the overall market.[35] BOCs, by contrast, have estimated market shares ranging from 50 percent to upwards of 80 percent. Whatever the actual share is, it is clear that the BOCs dwarf all other PSPs by significant margins.

The Commission almost summarily dismisses this market share information, claiming that, with respect to IXCs, the data "do not give the BOCs market power over IXCs." This conclusion misjudges the payphone market. Market power in payphone presubscription derives from a PSPs' control over traffic volumes. Individually, and collectively, the BOCs are, by far, the largest aggregators of traffic. They will, therefore, have significant bargaining power they can exercise when negotiating with IXCs for presubscription. This bargaining power could manifest itself in a number of ways. The BOC could demand exorbitant commissions from an IXC. It could demand that the IXC pay

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[34] 47 U.S.C. § 276(b)(1)(D).

[35] R&O at ¶ 232.

the BOC excessive billing and collection rates on calls originating from its payphones. It could demand that the IXC pass traffic to the BOC immediately upon the BOC receiving interLATA authority under Section 271 (or could demand termination conditions which make this result inevitable). Moreover, the BOC could negotiate selectively, only with those carriers that it wishes to favor as a result of other ventures it may have with the IXC. Regardless of the form this market power takes, the danger is that the BOCs will exercise that power in ways that are anticompetitive.

Further, as CompTel explained in its initial comments, the BOCs' control over large volumes of traffic will enable them to obtain the profit margins that a reseller typically enjoys.[36] In essence, the BOCs become de facto resellers of interLATA services. The BOC would determine its traffic volume needs, seek out carriers to obtain that volume, negotiate with carriers a commission rate which gives it, in effect, the lowest "cost" for meeting that volume, and then keep for itself whatever difference exists between its "costs" and the rates charged to end users. Because the Congress determined that the BOCs may not perform such activities within their regions until they had satisfied the conditions of Section 271, it is not in the public interest to allow the BOCs to become de facto resellers of payphone services prior to satisfying Section 271. Therefore, CompTel requests that the Commission reconsider its decision to allow BOC participation in the carrier selection process at this time.

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[36] CompTel Comments at 20.

## CONCLUSION

For the foregoing reasons, the Commission should reconsider its Report and Order in this docket. The Commission's compensation amount is grossly excessive and based upon erroneous information and faulty logic. In addition, its decision to allow compensation to vary from PSP to PSP is impractical, arbitrary and contrary to the public interest. Finally, the Commission erroneously places the burden of tracking compensable calls upon toll carriers, rather than on the primary economic beneficiary of the compensation, as the Commissions concludes it should do.

Respectfully submitted,

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